UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHANCE B. IRWIN,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

Case No. 3:13-cv-05895-BHS-KLS

REPORT AND RECOMMENDATION

Noted for August 8, 2014

Plaintiff has brought this matter for judicial review of defendant's denial of his application for supplemental security income ("SSI") benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Court's review, recommending that for the reasons set forth below, defendant's decision to deny benefits be reversed and this matter be remanded for further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On September 15, 2010, plaintiff filed an application for SSI benefits, alleging disability as of January 1, 2005. See ECF #15, Administrative Record ("AR") 19. That application was

denied upon initial administrative review on January 10, 2011, and on reconsideration on February 16, 2011. See id. A hearing was held before an administrative law judge ("ALJ") on May 16, 2012, at which plaintiff, represented by counsel, appeared and testified, as did a lay witness and a vocational expert. See AR 34-64.

In a decision dated June 27, 2012, the ALJ determined plaintiff to be not disabled. See AR 19-28. Plaintiff's request for review of the ALJ's decision was denied by the Appeals Council on September 3, 2013, making that decision the final decision of the Commissioner of Social Security (the "Commissioner"). See AR 1; 20 C.F.R. § 416.1481. On October 21, 2013, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner's final decision. See ECF #3. The administrative record was filed with the Court on February 11, 2014. See ECF #15. The parties have completed their briefing, and thus this matter is now ripe for the Court's review.

Plaintiff argues defendant's decision to deny benefits should be reversed and remanded for an award of benefits, or in the alternative for further administrative proceedings, because the ALJ erred in:

(1) rejecting the opinion of Carla van Dam, Ph.D.;

(2) failing to find plaintiff's seizure disorder was a severe impairment;

(3) failing to properly develop the record in regard to Dr. van Dam's concerns regarding the possibility of an underlying Fetal Alcohol Spectrum Disorder ("FASD");

(4) failing to properly consider whether plaintiff's impairments satisfied the criteria of 20 C.F.R. Part 404, Subpart P, Appendix 1, § 12.02C;

(5) discounting plaintiff's credibility;

(6) rejecting the lay witness evidence in the record;

(7) assessing plaintiff's residual functional capacity ("RFC"); and

(8) finding plaintiff to be capable of performing other jobs existing in significant numbers in the national economy.

For the reasons set forth below, the undersigned agrees the ALJ erred in rejecting the opinion of Dr. van Dam, in failing to properly consider the record in regard to the possibility of an underlying FASD and in rejecting the lay witness evidence in the record – thus in assessing plaintiff's RFC and in finding him to be capable of performing other jobs existing in significant numbers in the national economy – and therefore in determining plaintiff to be not disabled. Also for the reasons set forth below, however, the undersigned recommends that while defendant's decision to deny benefits should be reversed on these bases, this matter should be remanded for further administrative proceedings.

DISCUSSION

The determination of the Commissioner that a claimant is not disabled must be upheld by the Court, if the "proper legal standards" have been applied by the Commissioner, and the "substantial evidence in the record as a whole supports" that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v. Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772 F.Supp. 522, 525 (E.D. Wash. 1991) ("A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence and making the decision.") (citing Brawner v. Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1987)).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation omitted); see also Batson, 359 F.3d at 1193 ("[T]he Commissioner's findings are upheld if supported by inferences reasonably drawn from the record."). "The substantial evidence test

requires that the reviewing court determine" whether the Commissioner's decision is "supported by more than a scintilla of evidence, although less than a preponderance of the evidence is required." Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). "If the evidence admits of more than one rational interpretation," the Commissioner's decision must be upheld. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) ("Where there is conflicting evidence sufficient to support either outcome, we must affirm the decision actually made.") (quoting Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)). [1]

I. The ALJ's Rejection of Dr. van Dam's Opinion

The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in the record is not conclusive, "questions of credibility and resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v. Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at all) and whether certain factors are relevant to discount" the opinions of medical experts "falls within this responsibility." Id. at 603.

In resolving questions of credibility and conflicts in the evidence, an ALJ's findings

[1] As the Ninth Circuit has further explained:

> . . . It is immaterial that the evidence in a case would permit a different conclusion than that which the [Commissioner] reached. If the [Commissioner]'s findings are supported by substantial evidence, the courts are required to accept them. It is the function of the [Commissioner], and not the court's to resolve conflicts in the evidence. While the court may not try the case de novo, neither may it abdicate its traditional function of review. It must scrutinize the record as a whole to determine whether the [Commissioner]'s conclusions are rational. If they are . . . they must be upheld.

Sorenson, 514 F.2dat 1119 n.10.

"must be supported by specific, cogent reasons." Reddick, 157 F.3d at 725. The ALJ can do this "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings." Id. The ALJ also may draw inferences "logically flowing from the evidence." Sample, 694 F.2d at 642. Further, the Court itself may draw "specific and legitimate inferences from the ALJ's opinion." Magallanes v. Bowen, 881 F.2d 747, 755, (9th Cir. 1989).

The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." Id. at 830-31. However, the ALJ "need not discuss *all* evidence presented" to him or her. Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation omitted) (emphasis in original). The ALJ must only explain why "significant probative evidence has been rejected." Id.; see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981); Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

In general, more weight is given to a treating physician's opinion than to the opinions of those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need not accept the opinion of a treating physician, "if that opinion is brief, conclusory, and inadequately supported by clinical findings" or "by the record as a whole." Batson v. Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); see also Thomas v. Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician's opinion is "entitled to greater weight than the opinion of a nonexamining physician." Lester, 81 F.3d at 830-31. A non-examining physician's opinion may

constitute substantial evidence if "it is consistent with other independent evidence in the record." Id. at 830-31; Tonapetyan, 242 F.3d at 1149.

On December 15, 2010, Dr. van Dam performed a psychological evaluation of plaintiff, diagnosing him with family relationship problems, a learning disorder and a borderline learning disorder, and gave him a global assessment of functioning ("GAF") score of 45.[2] AR 463. In the diagnostic impression section of the evaluation report she completed, Dr. van Dam also wrote "Deferred to Medical Expertise (Presumed FASD)," after having observed that plaintiff's "eyes were very narrow, with facial features suggestive" of that condition. Id. In terms of prognosis, Dr. van Dam opined:

> . . . Chance has had somewhat of a chaotic life with frequent moves and inconsistent schooling. Concerns regarding an underlying Fetal Alcohol Spectrum Disorder were also raised, with such individuals flourishing only in settings where they have continuous close supervision to avoid making mistakes as they tend to have poor judgment and tend not to learn from their mistakes. He would benefit from a referral to an organization that would help provide him with supervised on-the-job training and give him the structure and support he needs. He would not be viewed as able to organize this independently. Ideally, arrangements would be made for him to become enrolled in the extended high school program, which would give him another few years of access to school and supervision and might allow him to participate in automotive type training through the New Market Skills Center. His grandmother confirmed that he requires continuous supervision and with that sort of support he is able to complete tasks. His condition would be viewed as being lifelong and permanent.

AR 462. With respect to the diagnoses and opinion concerning plaintiff's prognosis provided by Dr. van Dam, the ALJ stated in relevant part:

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[2] A GAF score is "a subjective determination based on a scale of 100 to 1 of 'the [mental health] clinician's judgment of [a claimant's] overall level of functioning.'" Pisciotta v. Astrue, 500 F.3d 1074, 1076 n.1 (10th Cir. 2007) (citation omitted). It is "relevant evidence" of the claimant's ability to function mentally. England v. Astrue, 490 F.3d 1017, 1023, n.8 (8th Cir. 2007). "A GAF score of 41-50 indicates '[s]erious symptoms . . . [or] serious impairment in social, occupational, or school functioning,' such as an inability to keep a job." Pisciotta, 500 F.3d at 1076 n.1 (10th Cir. 2007) (quoting Diagnostic and Statistical Manual of Mental Disorders (Text Revision 4th ed. 2000) at 34); see also Cox v. Astrue, 495 F.3d 614, 620 n.5 (8th Cir. 2007) ("[A] GAF score in the forties may be associated with a serious impairment in occupational functioning.").

> I give significant weight to Dr. van Dam's diagnosis/opinion of borderline intellectual functioning based on the claimant's performance on the WAIS-IV test (6F/4). However, I give little weight to her opinions regarding the claimant's functional ability. The claimant demonstrated average abilities on the mental status examination on December 15, 2010 (6F/3-4). Her suspicions and speculation with respect to possible FASD is inconsistent with the record, particularly the claimant's limited work history and his performance on the mental status examination. Furthermore, her opinion that the claimant should participate in an extended high school program is undermined by the fact that the claimant was able to enroll and participate in some college until he was injured in January 2012.

AR 26.

The undersigned agrees with plaintiff that the ALJ failed to provide legitimate reasons for rejecting Dr. van Dam's opinion. First, as noted by plaintiff, the mental status examination was not as unremarkable as the ALJ's findings imply. For example, Dr. van Dam noted plaintiff was "a poor informant," and though he was apparently cooperative, "appeared to be unable to provide specific information regarding various events in his life." AR 460. Also as noted by plaintiff, Dr. van Dam observed he did not know certain basic information, such as the number of weeks in a year or the direction of the sunrise. See AR 461. Thus, although as pointed out by defendant, Dr. van Dam found plaintiff demonstrated "good attention and concentration skills," the mental status examination findings overall cannot be said to reflect an average level of functioning. Nor do the findings on attention and concentration necessarily conflict with the need for structure and close supervision Dr. van Dam found, which appears to have had more to do with poor judgment and an inability to learn. See AR 462.

The ALJ's general statement that Dr. van Dam's "suspicions and speculation with respect to possible FASD" were "inconsistent with the record" (AR 26), furthermore, is an insufficient basis for rejecting the opinion of an examining psychologist. See Embrey v. Bowen, 849 F.2d 418, 421-22 (9th Cir. 1998) ("To say that medical opinions are not supported by sufficient

objective findings or are contrary to the preponderant conclusions mandated by the objective findings does not achieve the level of specificity our prior cases have required.") In addition, as just discussed the mental status examination was not as unremarkable as made out to be by the ALJ, and the ALJ fails to explain how a "limited work history" is inconsistent with a diagnosis of FASD or the limitations that may stem therefrom. Lastly, the evidence in the record fails to show plaintiff attended college for a sufficient length of time – or perform adequately while he was there – to necessarily undermine Dr. van Dam's suggestion that he should participate in an extended high school program. See AR 347.

As noted by defendant, the ALJ also appears to have supported his rejection of Dr. van Dam's opinion on the potential impact of FASD on plaintiff, by relying in part on the following comments of state non-examining consultative psychologist, Sean Mee, Ph.D.:

> [Dr. van Dam] notes speculation of possible FASD which she defers to "medical expertise" but then offers opinions that she indic[ates] are often associated with FASD which is not diag[nosed]. . . .

AR 83; see also AR 25. But while it may be true that because Dr. van Dam is a psychologist and that FASD is a medical condition – and thus she may not be qualified to diagnose plaintiff with it even if that diagnosis had been more definitive – her observations and opinions certainly raised the question as to whether plaintiff had that condition, and whether it significantly impacts his ability to function.[3] Indeed, Thomas Clifford, Ph.D., another state non-examining consultative psychologist who also reviewed the record, considered the potential existence thereof and need for further investigation in regard thereto as well. See AR 73 ("A question of FAS[D] remains to

[3] See Buxton v. Halter, 246 F.3d 762, 775 (6th Cir. 2001) (ALJ not obligated to accept psychologist's opinion that claimant could not maintain employment based on underlying physical conditions, because as psychologist she was not qualified to diagnose that impairment); see also Forsman v. Chater, 91 F.3d 151 (Table), 1996 WL 396718, at *1 (9th Cir. July 12, 1996) (ALJ's "specific reason for rejecting" medical source's "testimony, that it was based on speculation, is legitimate").

be answered, perhaps.").

At the hearing, plaintiff's counsel requested that the ALJ order a physical evaluation for plaintiff to resolve the question of whether he in fact had FASD. See AR 39. In so requesting, plaintiff's counsel agreed that Dr. van Dam was not herself qualified to make that diagnosis, but described her as "a very conservative psychologist who has been evaluating claimant's [sic] for decades," thereby warranting further investigation into the issue. Id. The ALJ denied the request because the issue "was sufficiently addressed at the [state review] level," and because:

> . . . [t]here is no mention of suspected fetal alcohol syndrome in the claimant's educational or medical records, nor is it mentioned as a condition in the third party statements provided by the claimant's grandmother, Nancy Irwin, except to reference Dr. van Dam's report . . .

AR 19.

An ALJ has the duty "to fully and fairly develop the record and to assure that the claimant's interests are considered." Tonapetyan, 242 F.3d at 1150 (citations omitted). That duty is triggered where the evidence in the record is ambiguous or the ALJ has found "the record is inadequate to allow for proper evaluation" thereof. Id.; see also Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001). Regardless of Dr. van Dam's reputation as a diagnostic clinician, as discussed above at least two psychologists in the record found the evidence sufficient enough to deem a diagnosis of FASD possible. The fact that plaintiff's grandmother, a lay witness, did not more specifically mention the diagnosis is not a sufficient basis for declining to further develop the record on this issue, as she herself is not a medical professional. It is difficult to see how the state agency review sufficiently addressed this issue, furthermore, given Dr. Clifford's comments and the fact that Dr. Mee merely paraphrased Dr. van Dam's findings and concluded FASD was not a diagnosed impairment.

Although the lack of mention of FASD in educational or other medical records *may*

indicate plaintiff has not previously been diagnosed with that condition, this does not necessarily mean he does not have it, or suffer from the effects of it, particularly given other evidence in the record – including Dr. van Dam's personal observations noted above – that such may be the case. For example, plaintiff's grandmother informed Dr. van Dam that his mother "was an alcoholic, and had been a binge drinker during at least the first trimester of the pregnancy. "AR 458; see http:// www.cdc.gov/ncbddd/fasd/index.html ("Fetal alcohol spectrum disorders (FASDs) are a group of conditions that can occur in a person whose mother drank alcohol during pregnancy."). The questions raised by this evidence, along with Dr. van Dam's and Dr. Clifford's comments and Dr. van Dam's opinion, created sufficient ambiguity in the evidence before the ALJ concerning this issue to trigger his duty to develop the record.

II. The ALJ's Evaluation of the Lay Witness Evidence in the Record

Lay testimony regarding a claimant's symptoms "is competent evidence that an ALJ must take into account," unless the ALJ "expressly determines to disregard such testimony and gives reasons germane to each witness for doing so." Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir. 2001). In rejecting lay testimony, the ALJ need not cite the specific record as long as "arguably germane reasons" for dismissing the testimony are noted, even though the ALJ does "not clearly link his determination to those reasons," and substantial evidence supports the ALJ's decision. Id. at 512. The ALJ also may "draw inferences logically flowing from the evidence." Sample, 694 F.2d at 642.

With respect to the lay witness evidence in the record, the ALJ found as follows:

> . . . I have considered the lay witness statements presented by the claimant's grandmother, Nancy Irwin (6E, 8E, 18E) and the testimony of his aunt, Jacqline Irwin. These statements and observations have been very carefully considered, and I have given them some weight in this assessment. However, their observations regarding the claimant's day-to-day activities do not establish that the claimant is disabled. Friends and family members are not

> medically trained to make exacting clinical observations. In considering evidence from "non-medical sources" who have not seen the individual in a professional capacity in connection with their impairments, such as spouses, parents, friends, and neighbors, it would be appropriate to consider such factors as the nature and extent of the relationship, whether the evidence is consistent with other evidence, and any other factors that tend to support or refute the evidence. Although I find that their statements somewhat credible as to their observations, their statements are inconsistent with the medical evidence of record, which does not support the claimant's allegations, and inconsistent with the claimant's reported level of activity throughout the record. I am unable to give significant weight to witness statements that are inconsistent with the medical evidence of record.

AR 26. The undersigned agrees with plaintiff that the reasons the ALJ offered here for rejecting the lay witness statements are not sufficiently specifically germane to each witness. See Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009) ("[T]he reasons 'germane to each witness' must be specific.") (quoting Stout v. Commissioner, Social Security Admin., 454 F.3d 1050, 1054 (9th Cir. 2006)). Although the ALJ need not cite specific portions of the record, the Court must be given at least some indication as to the actual medical or other evidence he relied on to reject the lay witness testimony. That indication is lacking here. Nor is the fact that neither lay witness is medically trained an adequate reason for doing so. See Dodrill v. Shalala, 12 F.3d 915, 918–19 (9th Cir.1993) ("[F]riends and family members in a position to observe a claimant's symptoms and daily activities are competent to testify as to her condition.").

IV. The ALJ's Assessment of Plaintiff's RFC and Step Five Determination

If a disability determination "cannot be made on the basis of medical factors alone at step three of the evaluation process," the ALJ must identify the claimant's "functional limitations and restrictions" and assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 *2. A claimant's residual functional capacity assessment is used at step four to determine whether he or she can do his or her past relevant work, and at step five to determine whether he or she can do other work. See id. It thus is what the claimant "can still do despite his

or her limitations." Id.

A claimant's residual functional capacity is the maximum amount of work the claimant is able to perform based on all of the relevant evidence in the record. See id. However, an inability to work must result from the claimant's "physical or mental impairment(s)." Id. Thus, the ALJ must consider only those limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a claimant's RFC, the ALJ also is required to discuss why the claimant's "symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical or other evidence." Id. at *7.

The ALJ assessed plaintiff with the residual functional capacity:

> **. . . to perform light work . . . [he] is able to perform simple routine tasks, but is limited to frequent handling with his left upper extremity. He should avoid even moderate exposure to hazards and should not operate motorized vehicles.**

AR 23 (emphasis in original). But because the ALJ erred in rejecting Dr. van Dam's opinion and the lay witness evidence in the record, the undersigned agrees with plaintiff it is far from clear that the ALJ's RFC assessment is supported by substantial evidence in the record. Accordingly, the undersigned finds the ALJ erred here as well.

If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation process the ALJ must show there are a significant number of jobs in the national economy the claimant is able to do. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. § 416.920(d), (e). The ALJ can do this through the testimony of a vocational expert or by reference to defendant's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

An ALJ's findings will be upheld if the weight of the medical evidence supports the hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);

Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the claimant's disability "must be accurate, detailed, and supported by the medical record." Id. (citations omitted). The ALJ, however, may omit from that description those limitations he or she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

At the hearing, the ALJ posed a hypothetical question to the vocational expert containing substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual functional capacity. See AR 61. In response to that question, the vocational expert testified that an individual with those limitations – and with the same age, education and work experience as plaintiff – would be able to perform other jobs. See AR 61-62. Based on the testimony of the vocational expert, the ALJ found plaintiff would be capable of performing other jobs existing in significant numbers in the national economy. See AR 27. Again, however, because of the ALJ's errors both in evaluating the medical and lay witness evidence in the record and in assessing plaintiff's RFC, it also cannot be said at this time that the hypothetical question the ALJ posed is completely accurate, and thus that the ALJ's reliance on the vocational expert testimony to find plaintiff disabled at step five is supported by substantial evidence at this time.

V. This Matter Should Be Remanded for Further Administrative Proceedings

The Court may remand this case "either for additional evidence and findings or to award benefits." Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is

unable to perform gainful employment in the national economy," that "remand for an immediate award of benefits is appropriate." Id.

Benefits may be awarded where "the record has been fully developed" and "further administrative proceedings would serve no useful purpose." Smolen, 80 F.3d at 1292; Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

> (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the claimant's] evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002). Because issues still remain in regard to the medical and lay witness evidence in the record, plaintiff's residual functional capacity and his ability to perform other jobs existing in significant numbers in the national economy, remand for further consideration of those issues is warranted.

Plaintiff argues that given the ALJ's errors, the opinion of Dr. van Dam and lay witness statements should be credited as a matter of law, resulting in a finding of disability and an award of benefits. It is true that where the ALJ has failed "to provide adequate reasons for rejecting the opinion of a treating or examining physician," that opinion generally is credited "as a matter of law." Lester, 81 F.3d at 834 (citation omitted). Similarly, where lay witness testimony is improperly rejected, it also may be credited as a matter of law. See Schneider v. Barnhart, 223 F.3d 968, 976 (9th Cir. 2000) (finding that when lay evidence rejected by ALJ is given effect required by federal regulations, it became clear claimant's limitations were sufficient to meet or equal listed impairment).

The Ninth Circuit has held, however, that where the ALJ is not required to find the

claimant disabled on the crediting of evidence, this constitutes an outstanding issue that must be resolved, and thus the Smolen test will not be found to have been met. See Bunnell v. Barnhart, 336 F.3d 1112, 1116 (9th Cir. 2003); see also Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003) (noting courts have "some flexibility" in how "credit as true" rule is applied); Garrison v. Colvin, --- F.3d ---, 2014 WL 3397218, at *21 (9th Cir. 2014) (holding Connett "allows flexibility to remand for further proceedings when the record as a whole creates serious doubt as to whether the claimant is, in fact, disabled").

In this case, it is not at all clear that the ALJ would be required to find the record supports a diagnosis of FASD, let alone the functional limitations Dr. van Dam opined resulted therefrom. Because of that, and given the conflicting medical evidence in the record, it also is far from clear that the ALJ would be required to find plaintiff disabled based on the lay witness evidence in the record as well. See Schneider, 223 F.3d at 976 (noting Commissioner failed to cite *any* evidence to contradict statements of five lay witnesses regarding claimant's disabling impairments). Thus, the undersigned finds there remains "serious doubt" as to whether plaintiff is in fact disabled, warranting remand for further administrative proceedings. Garrison, 2014 WL 3397218, at *21.

CONCLUSION

Based on the foregoing discussion, the undersigned recommends the Court find the ALJ improperly concluded plaintiff was not disabled. Accordingly, the undersigned recommends as well that the Court reverse defendant's decision to deny benefits and remand this matter for further administrative proceedings in accordance with the findings contained herein.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b), the parties shall have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file

objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **August 8, 2014**, as noted in the caption.

DATED this 21 day of July, 2014.

Karen L. Strombom
United States Magistrate Judge